Supreme Court, U.S.
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No. 99-395

In the Supreme Court of the United States

VANESSA ARMSTRONG, PETITIONER

v.

ACCREDITING COUNCIL FOR CONTINUING EDUCATION AND TRAINING, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a federal student loan program, which has since been modified, but which, at the time pertinent here, provided that a borrower could use school misconduct as a defense against a lender only if the lender had an "origination relationship" with the school, preempts a state law allowing a borrower to use the school's misconduct as a defense against the lender under a broader set of circumstances.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 168 F.3d 1362. The court of appeals' per curiam order amending its opinion (Pet. App. 20a-22a) is reported at 177 F.3d 1036. The initial opinion of the district court is reported at 832 F. Supp. 419. The court of appeals' decision vacating the district court's initial opinion and remanding the case is unpublished, but the decision is noted at 84 F.3d 1452 (Table). The opinion of the district court after remand (Pet. App. 23a-58a) is reported at 980 F. Supp. 53.

JURISDICTION

The initial opinion of the court of appeals was issued on March 23, 1999. The court of appeals denied a

petition for rehearing and amended its opinion on June 4, 1999. The petition for a writ of certiorari was filed on September 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Guaranteed Student Loan Program (GSLP) was established by Congress as part of the Higher Education Act of 1965 (HEA), 20 U.S.C. 1071 *et seq.*[1] The GSLP encourages private lending to students who would otherwise be unable to finance their educations by offering private lenders federal subsidies and a loan guarantee backed by federal reinsurance. The GSLP also encourages student loans by facilitating the purchase of the loans in the secondary market. Those purchases provide primary lenders with cash to make additional loans. Pet. App. 2a-3a.

Several developments in the GSLP are relevant to this case. First, in the late 1970s and early 1980s, Congress and the Department of Education took steps to increase the number of loans to vocational school students, including removing the ceiling on the federal interest subsidy, increasing aggregate loan limits, and allowing loans to students who had not completed high school. Pet. App. 3a-4a. In addition, Congress excluded GSLP loans from the requirements of the Truth in Lending Act (TILA). Pub. L. No. 97-320, § 701(a), 96 Stat. 1538. As a result, between 1982 and 1991, the Federal Trade Commission (FTC) ceased applying to GSLP loans a regulatory requirement known as the Holder Rule. Pet. App. 4a, 20a-21a. If it applied to

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[1] In 1992, the GSLP was renamed the Federal Family Education Loan Program. In this brief, we follow the court of appeals' practice of using the name of the program as it existed in 1988. Pet. App. 2a, n.*.

GSLP loans, the Holder Rule would have required loan agreements arranged by a school to contain a notice preserving the borrower's ability to raise against the lender claims and defenses arising from the school's misconduct. 16 C.F.R. 433.2(a) (1988).

Although the FTC did not apply the Holder Rule to GSLP loans between 1982 and 1991, the Department of Education during that period considered lenders who sought to collect on GSLP loans subject to state-law defenses based on a school's misconduct if the school "originated" the loan. See 34 C.F.R. 682.200, 682.206(a)(2) (1988); Pet. App. 5a. The Department's regulations defined origination as a "special relationship" arising when the lender delegated to the school "substantial functions or responsibilities normally performed by lenders before making loans." 34 C.F.R. 682.200(b) (1988); 51 Fed. Reg. 40,890 (1986).

Under the Department's policy, lenders were subject to defenses based on a school's misconduct *only* when they had an origination relationship with the school (and under certain other limited circumstances not relevant here). See Letter from Acting Assistant Secretary Kenneth D. Whitehead to Hon. Stephen J. Solarz (May 19, 1988) (stating that "a student who borrows under the GSL program from a third party lender remains responsible for repaying the loan even if the school closes" unless an "origination relationship" exists between the lender and the school); 55 Fed. Reg. 48,327 (1990) (describing Secretary's "longstanding view" that, absent an "origination relationship" between the lender and the school, "a student who borrows under the GSL program from a third-party lender remains legally responsible for repaying the loan, even if the school fails to provide the student with the services purchased by the student"); 34 C.F.R.

682.604(f)(2)(iii) (1989) (providing that students should be counseled that they cannot raise school-related defenses on a loan "other than a loan made or originated by the school"); Letter from General Counsel Jeffrey C. Martin to Hon. Edward M. Kennedy (Oct. 4, 1991) (explaining Department's view that "banks should be afforded protection from potential liability under state law for school misconduct" except in "a few narrow circumstances"); 57 Fed. Reg. 60,304 (1992).

The statutory and regulatory changes had the desired effect of increasing student loans to vocational school students. There was, however, a simultaneous increase in loan defaults that caused the government to incur significant expense. Pet. App. 5a. In 1992, Congress made a number of reforms to the GSLP that were designed to remedy that problem. Of particular relevance here, Congress directed the Secretary to develop a uniform loan application form and promissory note for the program. See *id.* at 5a-6a. The uniform promissory note developed by the Secretary contained a clause that allowed a borrower to assert any claim or defense against a lender that it would have against a for-profit school, if the school had referred the borrower to, or was affiliated with, the lender. That clause effectively incorporated the Holder Rule into each note and accorded with an FTC determination during the previous year that the Holder Rule should apply to promissory notes related to GSLP loans. *Id.* at 6a.

2. This case concerns a $4000 GSLP loan made in 1988 by the First Independent Trust Company of California to petitioner Vanessa Armstrong to finance her education at NBS Automotive School. Pet. App. 24a-25a. The promissory note contained a choice of law clause that subjected the loan contract to California law. *Id.* at 8a. According to petitioner, the school made

misrepresentations to her to induce her to attend its program. *Ibid.* Petitioner alleges that the school prepared her loan application, specified the type and amount of the loan, selected the lender, and transmitted her completed application to the lender. *Ibid.* The loan was guaranteed by the Higher Education Assistance Foundation (HEAF).[2] *Id.* at 25a. Soon after the promissory note was executed, it was obtained by respondent Bank of America, as trustee for respondent California Student Loan Finance Corporation. *Ibid.*

Petitioner attended NBS until June 1989 and made regular payments on her loan. The school closed in 1990 and filed for bankruptcy. Of the more than $5000 that petitioner paid NBS, petitioner recovered $900 in the bankruptcy proceedings. Pet. App. 8a-9a.

3. a. Petitioner then initiated the current lawsuit against the holder and guarantors of the note and the Secretary of Education (in his official capacity as reinsurer of the note).[3] Petitioner seeks damages, restitution, and declaratory relief absolving her of her duties under the note. The gravamen of petitioner's suit is that NBS defrauded her and failed to provide her the education that it promised. In the district court, petitioner raised federal claims based on the Holder Rule and the Department's school-origination policy, as well as a number of state-law claims. Pet. App. 9a. The

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[2] In 1994, during the course of this litigation, HEAF dissolved, and its guarantee obligation with respect to petitioner's loan was transferred to respondent Education Credit Management Corporation. See Pet. App. 9a.

[3] Petitioner also made claims against the Accrediting Council for Continuing Education and Training, which accredited NBS. Because those claims were settled, they were not part of the appeal below and are not relevant to the petition. See Pet. App. 9a-10a.

only state-law ground relevant to this petition is petitioner's claim under D.C. Code Ann. § 28-3809(a)(1) (1981), which provides in relevant part that:

> A lender who makes a direct installment loan for the purpose of enabling a consumer to purchase goods or services is subject to all claims and defenses of the consumer against the seller arising out of the purchase of the goods or service if such lender acts at the express request of the seller, and * * * the seller participates in the preparation of the loan instruments.

Pet. App. 68a.

b. The district court dismissed petitioner's federal claims for failure to state a claim on which relief could be granted. *Armstrong* v. *Accrediting Council for Continuing Educ. & Training, Inc.*, 832 F. Supp. 419 (D.D.C. 1993). See *Jackson* v. *Culinary Sch. of Washington, Ltd.*, 27 F.3d 573, 586 (1994) (holding that the Department's origination policy does not give rise to a federal cause of action), vacated on other grounds, 515 U.S. 1139, reinstated in pertinent part, 59 F.3d 254, 255 (D.C. Cir. 1995). The district court dismissed petitioner's claims under D.C. Code Ann. § 28-3809(a)(1) (1981) on two bases. First, the court ruled that petitioner failed to state a claim under that statute because she failed to allege one of the statute's elements—that the lender acted "at the express request of the seller." 832 F. Supp. at 430. Second, the court held that, even if petitioner had stated a claim under Section 28-3809, that state-law provision would be preempted because it purported to impose liability on lenders "for actions mandated by Congress." *Id.* at 431.

c. On appeal, petitioner conceded that she had no federal claim. See Pet. App. 9a. The court of appeals for the District of Columbia Circuit vacated and remanded for the district court to make an express determination whether it would exercise its discretion to retain jurisdiction over the pendent state-law claims and to enter a declaratory judgment. See *id.* at 9a-10a (citing *Armstrong* v. *Accrediting Council for Continuing Educ. & Training, Inc.*, 84 F.3d 1452 (D.C. Cir. 1996) (Table) (unpublished opinion), *available in* 1996 WL 250412). The court of appeals instructed the district court that, if it retained jurisdiction, it should first consider the validity of the choice-of-law clause in the promissory note and determine whether District of Columbia or California law applied. Only then should the court determine whether the applicable state law was preempted by federal law. 1996 WL 250412, **2.

d. On remand, the district court first decided to retain jurisdiction over the pendent claims and to consider petitioner's request for declaratory relief. See *Armstrong* v. *Accrediting Council for Continuing Educ. & Training, Inc.*, 950 F. Supp. 1 (D.D.C. 1996). Following the court of appeals' directions, the district court then considered the choice-of-law question and held that petitioner could not rely on D.C. Code Ann. § 28-3809 (1981) because the promissory note contained a valid choice-of-law clause requiring application of California law. Pet. App. 34a-35a. Accordingly, the district court did not reach the question whether D.C. Code Ann. § 28-3809 (1981) was preempted by federal law. Pet. App. 36a.

e. The court of appeals affirmed. The court did not address the questions before it in the order that it had previously directed the district court to proceed. Instead, the court reserved judgment on the choice-of-

law question and held that, even if D.C. Code Ann. § 28-3809 (1981) would otherwise apply, it was preempted by federal law. Pet. App. 16a. The court of appeals explained that, at the time that petitioner's loan was made, "federal student loan policy was intended to make student loans attractive to private lenders by protecting them from the consequences of student default." *Ibid.* The program allowed students to raise state-law school-misconduct defenses only in limited circumstances, including "where there is a school-origination relationship." *Ibid.* Because D.C. Code Ann. § 28-3809 (1981) would allow students to raise school-misconduct defenses in a broader range of circumstances than those in which origination relationships existed, the state statute was preempted. Pet. App. 16a.

Petitioner now seeks this Court's review solely on the question whether federal law preempts D.C. Code Ann. § 28-3809 (1981). Pet. i.[4]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, the question lacks substantial prospective importance because of intervening statutory and regulatory changes, and this case is not an appropriate vehicle to resolve the question in any event. This Court's review is therefore not warranted.

1. a. The court of appeals properly applied this Court's decisions holding that state law is preempted

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[4] Petitioner does not argue in this Court that NBS Automotive School "originated" her loan within the meaning of the applicable federal regulations. That fact-bound question would not, in any event, warrant the Court's review.

when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California* v. *ARC America Corp.*, 490 U.S. 93, 101 (1989); accord, *e.g.*, *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). And the court of appeals correctly held that D.C. Code Ann. § 28-3809 (1981) presented an obstacle to congressional purposes underlying the Guaranteed Student Loan Program (GSLP) at the time that petitioner's loan was made. At that time, the Department of Education, acting pursuant to its authority to implement the Higher Education Act of 1965 (HEA), 20 U.S.C. 1071 *et seq.*, had weighed the relative importance of (1) protecting borrowers from liability for GSLP loans used to attend schools that did not deliver promised training to their students, and (2) encouraging private lenders to make GSLP loans by protecting them from defenses based on the schools' actions. The Department had determined that to protect students, state-law school-based defenses could be used where a lender had a particularly close relationship (an "origination" relationship) with the school; but, to encourage lending, state-law school-based defenses could not be used in other circumstances. See pp. 3-4, *supra*. The court of appeals properly gave effect to that determination by ruling that, absent an origination relationship, state-law defenses such as D.C. Code Ann. § 28-3809 (1981) are preempted.

This case thus closely tracks this Court's seminal case involving preemption based on an obstacle to the accomplishment and execution of the full objectives of Congress. In *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), both the State of Pennsylvania and the United States had passed laws requiring registration of aliens. The federal statute did not require aliens to carry identifi-

cation cards and provided for punishment only of *willful* failure to register; in contrast, the Pennsylvania law required aliens to carry identification cards and provided for punishment of *any* failure to register. *Id.* at 59-61. The Court held that "Congress was trying to steer a middle path" between the need for some registration scheme and a desire not to impose overly harsh measures on aliens that might, inter alia, generate disloyalty. *Id.* at 73-74 & n.37. As a result, although compliance with both statutes was possible, the Court held that the Pennsylvania statute containing more strict requirements and harsher penalties was preempted because it stood as an obstacle to the accomplishment and execution of the full objectives of the federal scheme. See *id.* at 67, 74. Similarly, here, in implementing the HEA, the Department of Education tried to steer a middle path between protecting students and encouraging lending by allowing state-law school-based defenses only when a special, "origination" relationship existed. Application of laws such as D.C. Code Ann. § 28-3809 (1981) would have created an obstacle to the execution of that federal scheme by skewing its delicate balance and allowing state-law school-based defenses in a much broader range of cases.

b. Petitioner's principal objection to the decision of the court of appeals stems from a fundamental misreading of the court's opinion. Petitioner mistakenly states that the court found preemption based on "the FTC staff's decision not to enforce the FTC Holder Rule with respect to student loans during the period from 1982 to 1992." Pet. 12; see also Pet. 13, 14, 15. The court, however, did not determine that D.C. Code Ann. § 28-3809 (1981) was preempted because of the FTC's decision not to enforce its Holder Rule, but rather determined that the D.C. law was preempted because it

would frustrate "the Department's school-origination policy." Pet. App. 16a. The court of appeals held that federal law preempted the D.C. statute because "it would extend lender liability beyond school-origination relationships." *Ibid.* Petitioner's arguments that the FTC's failure to enforce the Holder Rule does not preempt state law (Pet. 14-19) are thus not relevant to the case at hand.

2. Contrary to petitioner's contentions, the decision of the court of appeals does not conflict with any decision of this Court. Petitioner incorrectly claims (Pet. 15-17) that the decision is inconsistent with *Puerto Rico Department of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988). In *Isla Petroleum*, Congress had provided that presidential authority to regulate the allocation and pricing of petroleum products would terminate on September 30, 1981. *Id.* at 498. The respondent oil companies nonetheless contended that state regulations governing petroleum that were promulgated four and one-half years later were preempted by Congress's decision to decontrol petroleum prices. The Court noted that there was no "extant federal regulation that might plausibly be thought to imply exclusivity" and rejected the view that preemption could arise solely from legislative history without reference to either statute or regulation. *Id.* at 501. Because "Congress ha[d] withdrawn from all substantial involvement in petroleum allocation and price regulation," the Court concluded that there could be no preemption without an explicit statement of preemptive intent. *Id.* at 504.

Here, in contrast, the federal government actively regulated student loans and their repayment through HEA and the Department of Education's regulations. And the court of appeals properly concluded that giving

effect to D.C. Code Ann. § 28-3809 (1981) in the absence of an origination relationship would frustrate the Department's "pre-1992 federal student loan policy." Pet. App. 16a. Thus, petitioner's contention (Pet. 15) that the court of appeals' decision "does not identify any affirmative statutory or regulatory mandate as the basis for preempting state laws" is incorrect, and there is no conflict between that decision and *Isla Petroleum*.

Petitioner's assertion (Pet. 17-18) that the decision of the court of appeals conflicts with *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), also lacks merit. In *Freightliner*, the Court held that state tort law imposing liability for failure to install anti-lock braking systems (ABS) in tractor-trailers was not preempted, because there was no federal regulation in effect either requiring or prohibiting ABS systems in those vehicles and no evidence that the federal regulatory agency decided that the vehicles should be free from state regulation on the subject. See *id.* at 286-287, 289-290. The Court concluded that "[a] finding of liability against petitioners [automobile manufacturers] would undermine no federal objectives or purposes with respect to ABS devices, since none exist." *Id.* at 289-290.

Here, in contrast, there was a federal policy concerning state-law defenses to GSLP loan repayment based on school misconduct. The Department of Education had determined that lenders should be subject to those defenses only in specified circumstances, such as when the school had so significant a role in the lending relationship that it "originated" the loan. See pp. 3-4, *supra*. The objective of that federal policy was to promote widespread access to student loans. Application in that context of D.C. Code Ann. § 28-3809 (1981) would undermine that federal objective

by allowing defenses based on school misconduct in situations in which the school's involvement in the lending relationship was not unusually extensive.

For the same reason, petitioner errs in contending (Pet. 18-19) that the decision of the court of appeals conflicts with this Court's cases allowing state law to impose liability greater than the liability imposed by federal law. Such cases, including *English* v. *General Electric Co.*, 496 U.S. 72 (1990), and *California* v. *ARC America Corp.*, 490 U.S. 93 (1989), address situations in which there is no conflict between the State's imposition of greater liability and federal law. Here, as in *Hines*, there is a conflict, because the federal scheme did not simply permit state-law school-based defenses in specified circumstances but *limited* state-law school-based defenses to those circumstances.[5]

3. There is no conflict among the courts of appeals on the question presented by petitioner, as petitioner herself admits. Pet. 21, 24. Petitioner nonetheless urges this Court to grant review on the basis of "divergent decisions emerging from the lower courts." Pet. 21. In fact, the lower courts have uniformly found state laws comparable to the one at issue here to be preempted. This Court's review is not warranted based on petitioner's assertion that those courts apply different rationales in reaching their uniform results.

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[5] Petitioner's reliance (Pet. 20-21) on *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966), and *United States* v. *Yazell*, 382 U.S. 341 (1966), is also misplaced. Those decisions concern the issue whether a court should rely on state law or fashion a federal common law rule when the court must fill in the interstices of a federal program. They do not concern the question presented here—under what circumstances federal law preempts conflicting state law.

Petitioner does not cite any case the holding of which is contrary to the court of appeals' decision here. Petitioner inaccurately asserts (Pet. 21-22) that *Veal* v. *First American Savings Bank*, 914 F.2d 909 (7th Cir. 1990), "states that state law defenses are not preempted." In the *Veal* case, the district court had held that the state-law remedy of rescission *was* preempted by federal law. See *id.* at 911; *Graham* v. *Security Sav. & Loan*, 125 F.R.D. 687, 692 (N.D. Ind. 1989). The district court also had held that plaintiffs failed to state a claim and that the HEA does not create a private right of action. *Id.* at 693. The court of appeals *affirmed* solely on the ground of failure to state a claim. *Veal*, 914 F.2d at 911. As a result, that court never addressed preemption.

Moreover, the footnote from *Veal* on which petitioner relies simply states that, "if sued by a Lender in state court for collection of one of these loans, each of these plaintiff students would be entitled to assert any defenses *available* under state law *that are applicable to his or her particular loan.*" 914 F.2d at 915 n.7 (emphasis added). That footnote reflects the fact that the HEA does not preempt *the entire field* of loan defenses. See 832 F. Supp. at 429 ("HEA does not preempt all relevant state law"). Therefore, state-law defenses may be "available" to student debtors and "applicable" to the students' loans to the extent those defenses do not actually conflict with federal law. Thus, apart from the fact that the footnote was not part of the holding in *Veal*, it is consistent with the decision in this case.

Petitioner also mistakenly claims (Pet. 22-23) that *Bartels* v. *Alabama Commercial College*, 189 F.3d 483 (11th Cir. 1999) (Table), petition for cert. pending, No. 99-540, is inconsistent with the D.C. Circuit's decision in

this case. Like the D.C. Circuit here, the Eleventh Circuit in *Bartels* held that the state defenses at issue were preempted by federal law.[6] Petitioner's contention that the reasoning in *Bartels* would lead the Eleventh Circuit to find preemption in circumstances in which the D.C. Circuit would not find preemption does not warrant this Court's review of petitioner's case. Petitioner would fare no better under the Eleventh Circuit's purportedly broader view of preemption. Moreover, this Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956), and the judgment in *Bartels* is consistent with the judgment here.

Finally, petitioner incorrectly implies (Pet. 23-24) that *Morgan* v. *Markerdowne Corp.*, 976 F. Supp. 301 (D.N.J. 1997), *Tipton* v. *Secretary of Education*, 768 F. Supp. 540 (S.D.W.Va. 1991), and *Bogart* v. *Nebraska Student Loan Program*, 858 S.W.2d 78, 81 (Ark. 1993), are inconsistent with the D.C. Circuit's decision in this case. All of those cases hold state claims preempted by the HEA and do not conflict with the decision here. *Morgan*, 976 F. Supp. at 319 ("[R]egulatory provisions specifying the consequences of an origination relationship establish the consequences of lender-school relationships. To allow states to impose greater liability would frustrate the purposes and objectives of the HEA."); *Bogart*, 858 S.W.2d at 81 (state-law defense based on agency relationship between lender and school preempted by HEA and implementing regulations); *Tipton*, 768 F. Supp. at 558 (state-law defense based on relationship between school and bank that resulted

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[6] Indeed, counsel for petitioner here has also filed a petition for a writ of certiorari on behalf of the student borrowers in *Bartels*, No. 99-540.

from actions dictated by HEA and implementing regulations preempted).

4. In any event, the question presented by petitioner lacks substantial prospective importance because statutory and regulatory changes made in 1992 and later years have eliminated the issue from more recent loans and provide alternative relief for many earlier loans. As a result of the 1992 amendments to the HEA, all GSLP loans issued during or after 1994 contain a clause that effectively incorporates the Holder Rule. Pet. App. 6a; see p. 4, *supra*. In addition, 20 U.S.C. 1087(c), enacted in 1992 and amended thereafter, provides for the discharge of a GSLP loan made in or after 1986 if the student is unable to complete a program due to school closure, the school falsely certified the student's eligibility, or the school failed to make a refund owed to the lender. Thus, the question decided by the court of appeals is relevant only to the small number of cases in which a student asserts a state-law school-based defense against the lender, the loan was made before 1994, and none of the bases for discharge listed in 20 U.S.C. 1087(c) is present. Because those circumstances are so narrow, further review is not warranted.

5. Even if the question presented were sufficiently important, this case would not be a proper vehicle to address it, because the question posed to this Court was not addressed by the district court, was not necessary to the disposition of the case, and was improvidently reached by the court of appeals. As the court of appeals correctly noted in its earlier order, the choice-of-law question should have been decided before the preemption question. 1996 WL 250412, **2. That order of consideration would have allowed the court to avoid the preemption question, which is constitutionally based. *Fidelity Fed. Sav. & Loan Assoc.* v. *Cuesta*, 458 U.S.

141, 152 (1982). See, *e.g.*, *Jean* v. *Nelson*, 472 U.S. 846, 854 (1985) (courts should consider non-constitutional grounds for decision before reaching constitutional questions); cf. *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 446 (1960) (Supreme Court decisions "enjoin seeking out conflicts between state and federal regulation where none clearly exists").

On the merits of the choice-of-law question, the district court correctly concluded that the loan's choice-of-law clause was operative and therefore California law, not District of Columbia law, applied (if it was not preempted). As the district court concluded, there was no merit to petitioner's argument that D.C. law should apply on the theory that the purpose of the choice-of-law clause was to frustrate the protections of D.C. law. See Pet. 32a-34a (noting that the choice-of-law clause employed standard language that was used nationally and approved by the Department). That conclusion necessitated dismissal of petitioner's claims under D.C. law, irrespective of preemption analysis, *id.* at 35a, 36a, and provides an alternate ground to support the judgment of the court of appeals.[7]

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[7] The district court also correctly found another independent non-constitutional basis for dismissing petitioner's claim under D.C. Code Ann. § 28-3809 (1981): petitioner failed to allege that her lender acted "at the express request of the seller," a prerequisite for the statute to apply. 832 F. Supp. at 430.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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